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80-1730

IN THE

Supreme Court of the United States

October Term, 1980

GILES M. LUGAR,
Petitioner

v.

EDMONDSON OIL
COMPANY, INC.

and

RONALD L. BARBOUR

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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INTRODUCTION

Giles M. Lugar, Plaintiff in the trial court, will hereafter be referred to as "Petitioner". Edmondson Oil Company, Inc., and Ronald L. Barbour, Defendants in the trial court, will hereafter be referred to as "Respondents". All references to the Petition for Writ of Certiorari will be designated "P" with the appropriate page number. References to the trial court record will be designated "R" and assigned the appropriate index number assigned by the Clerk of the District Court.

STATEMENT OF THE CASE

Petitioner's Statement of Facts generally accurately reflect the allegations set forth in the Petitioner's Complaint, however, it should be pointed out that the allegations as to Count I, the Count dealing exclusively with the

attachment procedures, do not contain an allegation of malice. It is not until Count II that an allegation of malice is made and that Count lumps together the levy made pursuant to the attachment statute as well as the seizures made pursuant to a Writ of Fieri Facias based on a judgment after a trial on the merits of the case. The Sheriff's action pursuant to the Writ of Fieri Facias is not here questioned by the Petitioner.

Count III of the Complaint does not claim a violation of any constitutionally protected rights and is not at issue in the Petition.

ISSUES

1. A Petitioner, who did not challenge the constitutionality of Virginia attachment statutes in the District Court and the Circuit Court has no standing to challenge the constitutionality of them

in this Court.

2. The Virginia attachment statutes, even if challenged, meet the test of due process as articulated by this Court.

3. A private litigant, acting independently, invoking a constitutionally valid statute does not act under "color of law" so as to furnish the necessary element of State action to sustain a claim pursuant to 42 U.S.C. 1983.

SUMMARY OF ARGUMENT

Petitioner did not challenge the constitutionality of the Virginia attachment statutes in the courts below and, therefore, should not be permitted to do so in this Court. The decisions of this Court and of various circuit courts cited by the Petitioner are distinguishable on that ground alone. Moreover, even should this Court choose to consider the constitutionality of the Virginia attachment

statutes, they will be found to meet the test of due process under this Court's decisions.

Given the constitutionality of the Virginia attachment statutes, there are no allegations in the Complaint which would support the element of State action necessary for an action laid under 42 U.S.C. 1983.

ARGUMENT

I.

THE PETITIONER DID NOT CHALLENGE THE CONSTITUTIONALITY OF THE VIRGINIA ATTACHMENT STATUTES IN THE DISTRICT COURT OR THE COURT OF APPEALS AND THUS, HAS NO STANDING TO CHALLENGE THE CONSTITUTIONALITY OF SAID STATUTES AT THIS STAGE OF THE CASE.

As noted in the District Court's opinion (P. 39), the Petitioner did not question, in the District Court, the constitutional validity of the Virginia attachment statutes. The District Court's

statement is amply supported by the Petitioner's Memorandum in Opposition to Respondents' Motion to Dismiss (R. 5). In his Memorandum, the Petitioner states:

> "The Defendants state... that the Plaintiff's claim for federal jurisdiction and his entire case is predicated upon the alleged absence of due process, by virtue of the application of State attachment statutes. This is incorrect. A reading of the Complaint...shows conclusively that the gravamen of this action is the alleged wrongful acts by the Defendant. No question of the constitutional validity of the State statutes is made." (emphasis supplied)

Again, in the en banc oral argument before the Fourth Circuit Court of Appeals, the Petitioner reiterated his disaffirmance of a challenge to the constitutional validity of the statutes. The Circuit Court took note of the Petitioner's position in its opinion when it stated:

> "...Lugar suggested somewhat ambivalently that he might not be challenging the statute's constitutionality,

> so that state court interpretation was not needed. After the motion to abstain was denied, this ambivalence persisted, both in the district court and on appeal to this court." (P. 43)

Since the constitutionality of the Virginia statutes was not placed in question in either the District Court or the Circuit Court and was not decided by either court, Petitioner should not be permitted, for the first time, to challenge them here. California v. Taylor, 353 U.S. 553 (1957), and cf. Youkaim v. Miller, 425 U.S. 23 (1976). Thus, the decision of the Fourth Circuit Court of Appeals is neither in conflict with the decisions of this Court or any of the other circuit courts.

Petitioner cites in support of his position the decisions of this Court of Fuentes v. Shevin, 407 U.S. 67 (1972), and Lynch v. Household Finance Corp., 405 U.S. 538 (1972). These decisions

involved a direct, unequivocal challenge to the replevin statutes of the States of Florida and Pennsylvania in Fuentes and to the garnishment statute of the State of Connecticut in Lynch.

The same criticism is true of the circuit court cases cited by the Petitioner, viz., Johnson v. American Credit Co. of Georgia, 581 F.2d 526 (5th Cir. 1978); Guzman v. Western State Bank of Devil's Lake, North Dakota, 516 F.2d 125 (8th Cir. 1975); Western Coach Corp. v. Shreve, 475 F.2d 754 (9th Cir. 1973); Jonnette v. Dollar Savings Bank of the City of New York, 530 F.2d 1123 (3rd Cir. 1976).

In both this Court's decisions and the Circuit Court's decisions, there was a direct constitutional attack on the statutes involved, and a decision was rendered based on the Court's analysis of the particular statute. State involvement

was undisputed and never an issue in any of these cases. Conversely, neither the District Court nor the Circuit Court reached the question of the constitutionality of the Virginia attachment statutes in the case at bar.

II.

THIS COURT SHOULD NOT PASS UPON THE CONSTITUTIONALITY OF THE VIRGINIA ATTACHMENT STATUTES, BUT EVEN IF IT DOES UNDERTAKE A REVIEW OF THEM, THEY WOULD BE FOUND TO MEET THE TEST OF DUE PROCESS WHEN MEASURED BY THIS COURT'S PRIOR DECISIONS.

This Court's earlier decisions of Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), and Fuentes v. Shevin, 407 U.S. 67 (1972), must be read in light of its later decisions of Mitchell v. W. T. Grant Co., 416 U.S. 600 (1974), and North Georgia Finishing, Inc.,

v. Di-Chem, Inc., 419 U.S. 601 (1975).[1]

With the added gloss of Carey v. Sugar, 425 U.S. 73 (1976), Professor Brabham (note 1, supra) synthesizes the decisions and concludes that the provision for an early post-seizure hearing, wherein the creditor who instigates the seizure bears the burden of proof of establishing a prima facie case for seizure, plus a provision for assuring the creditor's ability to respond in damages for an unlawful seizure will meet the minimum requirements of due process.

Mitchell and Di-Chem unquestionably changed the requirement of preseizure notice and hearing as enunciated in the

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[1] An excellent analysis of the interrelationship of these decisions appears in Brabham, Sniadach through Di-Chem and Backwards: An Analysis of Virginia's Attachment and Detinue Statutes, 12 U. Rich. L. Rev. 157, and Scott, Constitutional Regulation of Provisional Creditor Remedies: The Cost of Procedural Due Process, 61 Va. L. Rev. 807.

earlier cases of Sniadach and Fuentes. Mitchell and Di-Chem require only that an opportunity for an early hearing be provided. This position was subsequently reinforced by the cases of Mackey v. Montrym, 443 U.S. 1 (1979), and Berry v. Barchi, 443 U.S. 55 (1979).

Not only do the Virginia statutes meet the requirements of an early hearing and fiscal responsibility of the creditor, they go much further toward insuring the debtor a full measure of due process. A reading of the attachment statutes of the State of Virginia (1950 Code of Virginia, as amended) reveals a plan whereby, under circumstances which are basically limited to the loss or devaluation of security or property (§8.01-534, formerly §8-520), a claimant (§8.01-533, formerly §8-519) may upon a sworn petition before the clerk of court cause that clerk to issue a writ of attachment (§8.01-537, formerly §8-524;

and §8.01-540, formerly §8-526). The writ of attachment directs the sheriff to levy upon the property described in the writ (§8.01-546, formerly §8-533), but he is not empowered to seize the property unless the appropriate bond is posted (§8.01-551, formerly §8-538). The levy will be voided by the mere act of the debtor filing a verified grounds of substantial defense, if the creditor thereafter fails to post the proper bond (§8.01-552, formerly §8-539). Moreover, the debtor is given the opportunity to go immediately before the appropriate judge to contest the attachment, and if the judge finds that the grounds for the attachment do not exist or that there is little likelihood that the creditor will prevail on his claim,[2]

[2]See Carey v. Sugar, supra, where this Court apparently holds that had this issue been a permissible one for decision in a hearing under the New York statute, the statute would have met the minimum requirements of due process.

then the attachment will be quashed (§8.01-568, formerly §8-556). We see no substantial distinction between the attachment statutes of the State of Virginia and the sequestration statutes of the State of Louisiana which were approved by this Court in Mitchell with the exception of the issuing official being a clerk rather than a magistrate.[3]

Indeed, the Mitchell Court's description of an appropriate attachment procedure fits the Virginia statutes like a glove. There it was said:

> "More precisely in point, the Court had unanimously approved prejudgment attachment liens effected by creditors without notice, hearing or judicial order, saying that 'nothing is more common than to allow parties alleging themselves to be creditors to

[3]Justice Powell in his concurring opinion in Di-Chem did not require the issuing official to be a judicial official, but only a neutral party. See Footnote 3 to concurring opinion, 419 U.S. 612.

establish in advance by attachment a lien dependent for its affect upon the result of the suit.' The fact that the execution is issued in the first instance by an agent of the State, but not from a court, followed by personal notice and a right to take the case to court, is a familiar method... and is open to no objection." 416 U.S. 613

In his article, Professor Brabham reviewed the Virginia attachment statutes vis-a-vis this Court's decisions and concluded:

> "The attachment statutes have areas that arouse suspicion about their constitutionality, but they appear capable of withstanding a challenge by a latter day Sniadach or Fuentes. After all, the Supreme Court has come full circle." (supra, n. 1, p. 199)

III.

A PRIVATE LITIGANT, ACTING IN CONJUNCTION WITH A PUBLIC OFFICIAL PURSUANT TO A VALID STATE STATUTE, DOES NOT ACT UNDER "COLOR OF LAW" UNLESS THERE IS A JOINT MERETRICIOUS RELATIONSHIP BETWEEN THE PRIVATE LITIGANT AND THE PUBLIC OFFICIAL TO IMPROPERLY USE THE POWER THE STATE HAS GRANTED TO THE PUBLIC OFFICIAL.

The majority opinion of the Fourth Circuit in reaching its decision in this case is eminently correct. It properly applies the principles of Dennis v. Sparks, U.S. , 101 Sup. Ct. 183, 49 USLW 4001 (Nov. 17, 1980), and Flagg Brothers v. Brooks, 436 U.S. 149 (1978). Further, in reviewing the decisions of this Court, the Circuit Court properly pointed to the decisions where the public official was improperly using his authority in conjunction with the private litigant to deprive a complainant of a constitutionally protected right.

Neither the Petitioner nor the dissenting judges in the Circuit Court have cited a case in which a public official acting in good faith in conjunction with a private litigant pursuant to a constitutionally valid statute, regardless of the purposes or motivation of the private litigant, has been able to furnish the

necessary "color of law" requirement to sustain an action under 42 U.S.C. 1983.

The dissenting opinion of the Circuit judges relies primarily on Fuentes in support of its rationale. Such reliance is misplaced because, as pointed out above, the act of the private litigant in Fuentes was taken in conjunction with a public official pursuant to an unconstitutional statute. Nowhere in the Fuentes opinion is it ever intimated that the action of the official issuing the writ of replevin or of the private litigant requesting it would have deprived the plaintiff of due process, but for the fact the action was taken pursuant to the constitutionally invalid statute.[4]

Assuming, arguendo, the Respondents in the case at bar were unjustified and,

[4]The concurring opinion of Judge Widener correctly identifies the flaw in the dissent's rationale.

indeed, acting with malice under the valid attachment statutes of the State of Virginia, their bad faith acts, without more, would not have been jointly shared by the officials involved in issuing and serving the writ of attachment. Without such a sharing, there would not be sufficient State involvement to support the "color of law" requirement of a Section 1983 action.

CONCLUSION

Petititioner has wholly failed to demonstrate any conflict in the decision in this case with decisions in other circuits or with the decisions of this Court, nor has he demonstrated any important question of federal law which has not been previously considered and passed upon by this Court. The Petition, therefore, should be denied.

Respectfully submitted,

EDMONDSON OIL COMPANY, INC.
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CERTIFICATE

This is to certify that I am duly admitted to practice before the United States Supreme Court and that I have this 13th day of May, 1981, mailed a true copy of the foregoing Respondents' Brief in Opposition to Petition for Writ of Certiorari to Mr. Robert L. Morrison, Jr., of Warren, Parker, Williams & Stilwell, 317 Patton Street, Suite B, Danville, Virginia, 24541, counsel for Petitioner.

Jackson L. Kiser
Jackson L. Kiser

APPENDIX

(Text of Virginia Code Sections
Cited in Argument)

§8.01-533 (formerly §8-519). Who may sue out attachment. -- If any person have a claim, legal or equitable, to any specific personal property, or a like claim to any debt, including rent, whether such debt be due and payable or not, or to damages for breach of any contract, express or implied, or to damages for a wrong, and such claim exceed twenty dollars, exlusive of interest, he may sue out an attachment therefor on any one or more of the grounds stated in §8.01-534, except that if the claim be for a debt not due and payable no attachment shall be sued out when the only ground for the attachment is that the defendant, or one of the defendants against whom the claim is, is a foreign corporation, or is not a resident of this Commonwealth, and has estate, or has debts owing to such defendant, within this Commonwealth.

* * *

§8.01-534 (formerly §8-520). Grounds of attachment. -- It shall be sufficient ground for an attachment that the principal defendant or one of the principal defendants:

1. Is a foreign corporation, or is not a resident of this Commonwealth, and has estate or has debts owing to such defendant within the county or city in which the attachment is, or that such defendant being a nonresident of this Commonwealth, is entitled to the benefit of any lien, legal or equitable, on property, real or personal, within the county or city in which the attachment is. The word "estate," as herein used, shall include all rights or interests of a pecuniary nature which can be protected, enforced, or proceeded against in courts of law or equity;

2. Is removing or is about to remove out of this Commonwealth with intent to

change his domicile;

3. Intends to remove, or is removing, or has removed the specific property sued for, or his own estate, or the proceeds of the sale of his property, or a material part of such estate or proceeds, out of this Commonwealth so that there will probably not be therein effects of such debtor sufficient to satisfy the claim when judgment is obtained therefor should only the ordinary process of law be used to obtain the judgment;

4. Is converting, is about to convert or has converted his property of whatever kind, or some part thereof, into money, securities or evidences of debt with intent to hinder, delay, or defraud his creditors;

5. Has assigned or disposed of or is about to assign or dispose of his estate, or some part thereof, with intent to hinder, delay or defraud his creditors;

6. Has absconded or is about to abscond from the Commonwealth or has concealed himself to the injury of his creditors, or is a fugitive from justice.

The intent mentioned in subdivisions 4 and 5 above may be stated either in the alternative or conjunctive.

* * *

§8.01-537 (formerly §8-524). Petition for attachment; writ tax. -- A. Every attachment, except an attachment for rent, shall be commenced by a petition filed in the clerk's office, whether the court be in session or not, or before a district court judge or clerk of a district court of the county or city in which venue is given by subdivision 11 of §8.01-261. If it is sought to recover specific personal property the petition shall state the nature and estimated value thereof, the character of estate therein claimed by the plaintiff, and what sum, if any, the

plaintiff claims he is entitled to recover for its detention. If it is sought to recover a debt or damages for a breach of contract, express or implied, or damages for a wrong, the petition shall set forth the plaintiff's claim with such certainty as will give the adverse party reasonable notice of the particulars thereof, and shall state a sum certain which, at the least, the plaintiff is entitled to, or ought to recover, and if the claim be for a debt not then due and payable, at what time or times the same will become due and payable. The certainty required of a petition for attachment shall be the same as required for a motion for judgment under Rules of Court 1:4(d) and 3:16(b). The petition shall also set forth the existence of one or more of the grounds of attachment mentioned in §8.01-534, and shall ask for an attachment against the specific personal property mentioned in

the petition, or against the estate, real and personal, of one or more of the principal defendants, or against both the specific personal property and the estate of such defendants, real or personal. The petition shall be sworn to by the plaintiff or his agent, or some other person cognizant of the facts therein stated.

* * *

§8.01-540 (formerly §8-526). Issuance of attachment; against what attachment to issue. -- Upon the filing of the petition mentioned in §8.01-537, the clerk or the magistrate before whom the petition is filed shall issue an attachment in accordance with the prayer of the petition, subject to the provisions of §8.01-538. If the plaintiff seeks the recovery of specific personal property, the attachment may be against such property and against the principal defendant's

estate for so much as is sufficient to satisfy the probable damages for its detention; or, at the option of the plaintiff, against the principal defendant's estate for the value of such specific property and the damages for its detention. If the plaintiff seeks to recover a debt or damages for the breach of a contract, express or implied, or damages for a wrong, the attachment shall be against the principal defendant's estate for the amount specified in the petition as that which the plaintiff at the least is entitled to or ought to recover.

If the attachment be issued by a magistrate, it shall be returnable as prescribed by §8.01-541. The magistrate shall promptly return to the clerk's office of the court to which the attachment is returnable the petition and the bond, if any, filed before him. The proceedings thereafter shall be the same as

if the attachment had been issued by the clerk.

* * *

§8.01-546 (formerly §8-533). What attachment to command; summons. -- Every attachment sued out against specific personal property shall command the sheriff or other officer to whom it may be directed to attach the specific property claimed in the petition, and so much more of the real and personal property of the principal defendant as shall be necessary to cover the damages for the detention of the specific property sued for and the costs of the attachment. Every other attachment shall command the sheriff or other officer to whom it may be directed to attach the property mentioned and sought to be attached in the petition, if any, and so much of the lands, tenements, goods, chattels, moneys and effects of the principal defendant not exempt from execution

as will be sufficient to satisfy the plaintiff's demand, and, in case of tangible personal property, taken possession of under §8.01-551, to keep the same safely in his possession to satisfy any judgment that may be recovered by the plaintiff in such attachment.

Every attachment sued out under this section shall also command the sheriff or other officer to summon the defendant or defendants, if he or they be found within his county or city, or any county or city wherein he may have seized property under and by virtue of such writ, to appear and answer the petition for the attachment.

* * *

§8.01-551 (formerly §8-538). When bond given officer to take possession of property. -- If the plaintiff shall, at the time of suing out an attachment, or afterwards, give bond with surety, approved by the clerk issuing the attachment, in a

penalty of at least double the fair value of the property on which the attachment is levied, with condition to pay all costs and damages which may be awarded against him, or sustained by any person, by reason of his suing out the attachment, the officer to whom the attachment is directed shall take possession of the property specified in the attachment, or when no such property is specified, of any estate or effects of the defendant, or so much thereof as is sufficient to pay the plaintiff's claim. When such bond is given, the fact shall be endorsed on the attachment, or certified by the clerk to the officer, who shall return the certificate with the attachment. But the officer levying the attachment shall, before taking possession of any property as aforesaid, make his certificate of the fair value of the property on which the attachment is levied, and he shall not

take possession of the same unless and until bond as aforesaid shall be given in a penalty of at least double the fair value of the property as so stated in his certificate. Such certificate shall be filed in the clerk's office of the court to which the attachment is returnable and the value so certified shall be subject to review by the court to which the attachment is returnable.

* * *

§8.01-552 (formerly §8-539). Bond required of plaintiff when defendant makes affidavit of substantial defense. -- If a principal defendant shall file in the clerk's office of the court to which the attachment is returnable an affidavit of himself, his agent or attorney, that he has a substantial defense to the merits of the plaintiff's claim, it shall be the duty of the clerk forthwith to notify the plaintiff, his agent or attorney, of that

fact, and the attachment shall stand, dismissed ipso facto unless within ten days from the service of such notice the plaintiff, or someone for him, shall enter into bond with security approved by such clerk, in a penalty of at least double the amount of the claim sworn to or sued for, with condition that the plaintiff will prosecute his attachment with diligence, and that the obligors will pay all costs and damages which may be awarded against the plaintiff, or sustained by such defendant, or any other person, by reason of suing out the attachment. But this section shall not apply in any case in which the plaintiff has, prior to the filing of such affidavit, given the bond designated in §8.01-551, or the defendant has given the bond designated in §8.01-553.

* * *

§8.01-568 (formerly §8-556). Quashing attachment or rendering judgment for defen-

dant. -- The court in which an attachment is pending, may, either before or at any time after an attachment has been returned, on motion of the principal defendant, or any defendant claiming title to, an interest in, or a lien upon the property attached, or any part thereof, after reasonable notice to the plaintiff, hear testimony and quash the attachment, if of opinion that the attachment is invalid on its face, or that none of the grounds for attachment in §8.01-534 exist, or that the plaintiff is not likely to succeed on the merits of his underlying claim. When the attachment is properly sued out, and the case is heard upon its merits, if the court be of opinion that the claim of the plaintiff is not established, final judgment shall be given for the defendant. In either case, he shall recover his costs, and damages for loss of the use of his property, and there shall be an order for

the restoration of the attached effects. The plaintiff shall have the burden of proof in proceedings pursuant to this section.